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NOT FOR PUBLICATION

**UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION**

In re:
PROTOTYPE ENGINEERING &
MANUFACTURING, INC.,
Debtor.

WESLEY H. AVERY, Chapter 7 Trustee,
Plaintiff,
v.
LEYA TECHNOLOGIES, LLC; BAHRAM
BORDBAR, INDIVIDUALLY, AND AS
TRUSTEE OF THE BORDBAR FAMILY
TRUST; MALAHAT BORDBAR,
INDIVIDUALLY, AND AS TRUSTEE OF
THE BORDBAR FAMILY TRUST; SARA
BORDBAR; AND DOES 1-10,
INCLUSIVE,
Defendants.

No. 2:17-bk-21018-RK
Chapter 7
Adv. No. 2:19-ap-01332-RK
**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANTS'
MOTION TO DISMISS PLAINTIFF'S
FIRST AMENDED COMPLAINT**

Pending before the court is the motion of defendants Bahram Bordbar and Malahat Bordbar, individually and as Trustees of the Bordbar Family Trust, and Leya Technologies, LLC (together "Defendants") to dismiss claims of plaintiff Wesley H. Avery, Chapter 7 Trustee ("Plaintiff"), in the first amended complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), Electronic Case Filing Number ("ECF") 10 (the "Motion"). The court

1 conducted an initial hearing on the Motion on December 3, 2019. Brian L. Davidoff, of the
2 law firm of Greenberg Glusker Fields Claman & Machtinger LLP, appeared for Defendants.
3 Carmela T. Pagay, of the law firm of Levene, Neale, Bender, Yoo & Brill, L.L.P., appeared
4 for Plaintiff. Todd E. Phillips and Kevin M. Davis, of the law firm of Caplin & Drysdale,
5 Chartered, appeared for the Intervening Parties Jon and Maria Ternstrom, Cameron and
6 Michelle Witzler and Collette Carpenter, individually and in her capacity as administrators
7 of the estates of Clayton O. Carpenter (also referred to herein as “Crash Victim
8 Claimants”). After the hearing on December 3, 2019, the court took the motion under
9 submission at the conclusion of the hearing and set a further hearing on December 10,
10 2019 to announce a ruling on the motion. Having considered the moving and opposing
11 papers and the oral arguments of the parties, the court now issues this written order.

12 As orally announced at the hearing on December 3, 2019, the court will grant the
13 motion to dismiss Claim 20 for substantive consolidation on procedural grounds, with leave
14 to file an amended claim. Plaintiff did not give notice of the claim for substantive
15 consolidation to the creditors of Defendants, who and which are nondebtor parties, to
16 whom and to which notice was and is required. *In re Mihranian*, 937 F.3d 1214, 1218 (9th
17 Cir. 2019). Because the court grants the motion to dismiss Claim 20 on procedural
18 grounds for lack of notice, the court does not reach the merits of the motion seeking
19 dismissal of the claim for failure to state a claim upon which relief can be granted pursuant
20 to Federal Rule of Civil Procedure 12(b)(6). As suggested by the court, if Plaintiff intends
21 to file an amended substantive consolidation claim or motion, he should file it as a separate
22 proceeding so that the creditors of debtor and the nondebtor party defendants need not
23 involve themselves in the other claims in this adversary proceeding.

24 As orally announced at the hearing on December 3, 2019, the court will grant the
25 motion to dismiss Claim 21 for trade secret misappropriation because the claim did not
26 adequately allege the existence of a trade secret as required by California Civil Code, §
27 3426.1(d). Federal Rule of Civil Procedure 8(a)(2) requires Plaintiff to allege in a pleading
28 that states a claim for relief “a short and plain statement of the claim showing that the

1 pleader is entitled to relief.” *See also, Alta Devices, Inc. v. LG Electronics, Inc.*, 343
2 F.Supp.3d 868, 876 (N.D. Cal. 2018). A complaint that fails to meet this standard may be
3 dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6). *Id.* Federal Rule of Civil
4 Procedure 8(a) requires that a plaintiff must plead “enough facts to state a claim to relief
5 that is plausible on its face.” *Id.*, citing and quoting, *Bell Atlantic Corp. v. Twombly*, 550
6 U.S. 544, 570 (2007). “A claim has facial plausibility when the plaintiff pleads factual
7 content that allows the court to draw the reasonable inference that the defendant is liable
8 for the misconduct alleged.” *Id.*, citing and quoting, *Ashcroft v. Iqbal*, 556 U.S. 662, 678
9 (2009). “The plausibility standard is not akin to a probability requirement, but it asks for
10 more than a sheer possibility that a defendant has acted unlawfully.” *Id.* In ruling on a
11 motion under Federal Rule of Civil Procedure 12(b)(6), the court must “accept factual
12 allegations in the complaint as true and construe the pleadings in the light most favorable
13 to the nonmoving party.” *Id.*, citing and quoting, *Manzarek v. St. Paul Fire & Marine*
14 *Insurance Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008).

15 To state a plausible claim for trade secret misappropriation under the California
16 Uniform Trade Secrets Act, California Civil Code, § 3426 *et seq.*, Plaintiff must “describe
17 the subject matter of the trade secret with sufficient particularity to separate it from matters
18 of general knowledge in the trade or of special persons who are skilled in the trade, and to
19 permit the defendant to ascertain at least the boundaries within which the secret lies.” *Alta*
20 *Devices, Inc. v. LG Electronics, Inc.*, 343 F.Supp.3d at 880-881 (citations omitted).
21 California Civil Code, § 3426.1(d) provides that “‘Trade secret’ means information,
22 including a formula, pattern, compilation, program, device, method, technique, or process,
23 that: (1) Derives independent economic value, actual or potential, from not being generally
24 known to the public or to other persons who can obtain economic value from its disclosure
25 or use; and (2) Is the subject of efforts that are reasonable under the circumstances to
26 maintain its secrecy.”

27 Plaintiff did not adequately describe the existence of a trade secret as required by
28 California Civil Code, § 3426.1(d) by alleging in paragraph 185 in the first amended

1 complaint that Debtor's trade secrets consisted of "proprietary manufacturing processes,
2 information relating to research, customer lists, product plans, services, customer data,
3 marketing strategies, finances, strategic plans, business plans and/or confidential business
4 related information" because such description, as Defendants argue, is just a laundry list of
5 every type of information that a company like Debtor could be expected to have, which
6 does not give sufficient particularity to Defendants to give them fair notice of what precisely
7 they are accused of misappropriating in the way of trade secrets. Federal Rule of Civil
8 Procedure 8(a)(2); *Alta Devices, Inc. v. LG Electronics, Inc.*, 343 F.Supp.3d at 880-881;
9 *see also, Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (a pleading must "give
10 the defendant fair notice of what the . . . claim is and the grounds upon which it rests")
11 (citations omitted).

12 Although the court grants the Motion as to Claim 21, the court will grant leave to
13 amend pursuant to Federal Rule of Civil Procedure 15(a)(2), which provides that courts
14 should freely give leave in the interests of justice, because here, Plaintiff's amendment of
15 Claim 21 for trade secret misappropriation would be the first amendment of such claim,
16 and Defendants have not demonstrated that amendment would be futile or that they would
17 suffer any prejudice from amendment.

18 Because, as discussed below, the court is otherwise denying the motion as to the
19 remaining objected-to claims and ordering Defendants to answer the surviving claims in
20 the first amended complaint, if Plaintiff intends to amend Claim 21, he should file and serve
21 a supplement to the first amended complaint, which will then be considered as part of the
22 amended complaint if it is allowed to proceed.

23 The court will deny the motion to dismiss as to Plaintiff's Claims 5 and 6 for
24 constructive fraudulent transfer based on insolvency under California Civil Code, §
25 3439.05(a) because the claims adequately plead the required elements of insolvency and
26 transfers lacking reasonably equivalent value to allege plausible claims for relief. California
27 Civil Code, § 3439.05(a) provides: "A transfer made or obligation incurred by a debtor is
28 voidable as to a creditor whose claim arose before the transfer was made or the obligation

1 was incurred if the debtor made the transfer or incurred the obligation without receiving a
2 reasonably equivalent value in exchange for the transfer or obligation and the debtor was
3 insolvent at that time or the debtor became insolvent as a result of the transfer or
4 obligation.” The two requirements of a claim under California Civil Code, § 3439.05 are
5 that the transfer was made without receiving reasonably equivalent value, and the debtor
6 was either insolvent or became insolvent as a result of the transfer. *Id.*

7 “To determine whether a pleading adequately states a plausible claim for relief, a
8 court must first take ‘note of the elements a plaintiff must plead to state a claim.’” Phillips
9 and Stevenson, *Rutter Group Practice Guide: Federal Civil Procedure Before Trial,*
10 *California & Ninth Circuit Edition*, ¶ 8:125 (online edition, April 2019 update), *citing and*
11 *quoting, Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009). “*Iqbal*, supra, then requires a two-
12 prong analysis: —First, conclusory allegations are disregarded; —Second, ‘[w]hen there
13 are well-pleaded factual allegations, a court should assume their veracity and then
14 determine whether they plausibly give rise to an entitlement to relief.’” *Id.*, *citing and*
15 *quoting, Ashcroft v. Iqbal*, 556 U.S. at 679. To determine whether a claim is plausible, a
16 court should consider the complaint’s factual allegations “together with all reasonable
17 inferences” from the allegations. *Id.*, ¶ 8:127a, *citing and quoting, Cafasso, U.S. ex rel. v.*
18 *General Dynamics C4 Systems, Inc.*, 637 F.3d 1047, 1054 (9th Cir. 2011). Moreover, the
19 “complaint should be read as a whole, not parsed piece by piece to determine whether
20 each allegation, in isolation, is plausible.” *Id.*, ¶ 8:127b, *citing and quoting, Hernandez-*
21 *Cuevas v. Taylor*, 723 F.3d 91, 103 (1st Cir. 2013). “The relevant question . . . in assessing
22 plausibility is not whether the complaint makes any particular factual allegations but, rather,
23 whether ‘the complaint warrant[s] dismissal because it failed *in toto* to render plaintiffs’
24 entitlement to relief plausible.” *Id.*, ¶ 127c, *quoting, Rodriguez-Reyes v. Molina-Rodriguez,*
25 711 F.3d 49, 55 (1st Cir. 2013), *quoting, Bell Atlantic Corp. v. Twombly*, 550 U.S. at 569 n.
26 14.

27 The first amended complaint, ECF 9, adequately pleads the element of insolvency in
28 paragraphs 5, 50, 55 and 72, alleging in paragraph 5 that Plaintiff has reviewed Debtor’s

1 books and records that have been made available to him and his counsel and in paragraph
2 50 that “as of at least September 2013, and at all times since, Prototype [i.e., Debtor] has
3 been insolvent according to its books and records”, which the court construes as
4 allegations of balance sheet insolvency within the meaning of California Civil Code, §
5 3439.02(a) (and 11 U.S.C. § 548(a)(1)(B)(ii)(I)).

6 The so-called balance sheet test for insolvency is set forth in California Civil Code, §
7 3439.02(a), and Section 101(32) of the Bankruptcy Code, 11 U.S.C. *Bui v. Perez (In re*
8 *Tenorio)*, BAP No. CC-17-1102 FLKu, 2018 WL 989691, slip op. at *9. (9th Cir. BAP,
9 February 8, 2018). Under California Civil Code, § 3439.02(a), “[a] debtor is insolvent if, at
10 a fair valuation, the sum of the debtor’s debts is greater than the sum of the debtor’s
11 assets.” *See also, In re Tenorio*, 2018 WL 989691, slip op. at *9. 11 U.S.C. § 102(32)(A)
12 states that the term “insolvent” means “with reference to an entity other than a partnership
13 and a municipality, financial condition such that the sum of such entity’s debts is greater
14 than all of such entity’s property, at a fair valuation, exclusive of—(i) property transferred,
15 concealed, or removed with intent to hinder, delay, or defraud such entity’s creditors; and
16 (ii) property that may be exempted from property of the estate under section 522 of this
17 title”. *See also, In re Tenorio*, 2018 WL 989691 at *9. “In an action to recover a preference
18 or a fraudulent transfer, insolvency may be determined on the basis of a ‘balance sheet’
19 test. This correlates with the definition of ‘insolvent’ in [11 U.S.C.] § 101(32) that a
20 corporation is insolvent if the sum of the entity’s debts is greater than all of the entity’s
21 property at a fair valuation.” *Id., citing and quoting, Everett v. Thomas Capital Investments*
22 *(In re Pacific Thomas Corp.)*, 543 B.R. 7, 13 (Bankr. N.D. Cal. 2015). “Thus, both federal
23 and state law agree that, under the ‘balance sheet’ test, a debtor is insolvent when its
24 liabilities exceed its assets.” *Id., citing and quoting, Sierra Steel, Inc. v. Totten Tubes, Inc.*
25 *(In re Sierra Steel, Inc.)*, 96 B.R. 275, 277 (9th Cir. BAP 1989) (alteration omitted).

26 Plaintiff’s allegation that, upon review, the books and records of Debtor show that
27 Debtor was insolvent at least by September 2013 plausibly alleges the element of
28 insolvency for purposes of a claim for constructive fraudulent transfer under California Civil

1 Code, § 3439.05(a) because the Debtor’s books of account are likely to be probative of its
2 balance sheet solvency or insolvency, and thus, if the allegation were true, the court could
3 reasonably infer that the books and records showed that Debtor’s liabilities exceeded its
4 assets, which would satisfy the balance sheet test of insolvency.

5 The sufficiency of Plaintiff’s pleading of insolvency in this case is supported by
6 examples in the case law. In *Beskroner v. OpenGate Capital Group (In re Pennysaver USA*
7 *Publishing, LLC)*, 587 B.R. 445 (Bankr. D. Del. 2018), the court held that the plaintiff
8 trustee sufficiently pleaded a constructive fraudulent transfer claim under the California
9 Uniform Fraudulent Transfer Act, California Civil Code, § 3439.05, and other applicable
10 law, by alleging that the transfer was for less than reasonably equivalent value at a time
11 when debtors were insolvent. In *Pennysaver USA Publishing*, the plaintiff specifically
12 described “the Debtors’ declining financial performance and [increasing] loan obligations,”
13 thereby demonstrating insolvency. *Id.* at 456-459. The court in *Pennysaver USA*
14 *Publishing* also stated that at the motion to dismiss stage, the plaintiff only needed to
15 adequately plead a constructive fraud claim by alleging a transfer for less than reasonably
16 equivalent value at a time when the debtors were insolvent, and specifically, that
17 “[i]nsolvency is best left to discovery to determine and should not generally be decided on
18 a motion to dismiss[] . . . because the determination of insolvency is highly fact-specific
19 and ‘should be based on seasonable appraisals or expert testimony.’” *Id.* at 456 and 459.¹
20 The pleading of balance sheet insolvency in this case is at least as strong as the plaintiff’s
21 allegations in the *Pennysaver USA Publishing* case.

22 Similarly, the district court in *Sorenson v. New Koosharem Corporation*, Case No.
23 15-cv-01088-RGK (PJWx), 2015 WL 12426149 (Bankr. C.D Cal., October 15, 2015) held
24 that allegations that the transferor was indebted to the complaining creditor and had
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26 ¹ See also *Golden v. Clay Lacy Aviation, Inc. (In re Aletheia Research & Mgmt., Inc.)*, BAP No. CC-15-
27 1081-KiTaKu, 2015 Bankr. LEXIS 4145, 2015 WL 8483728, at *8 (9th Cir. BAP, Dec. 10, 2015)
28 (holding that “[factual] findings [as to reasonable equivalent value] are not appropriate in the context
of a motion to dismiss under Civil Rule 12(b)(6)[.]” because the issue is “clearly a question of fact.”)
(citing cases).

1 transferred assets without receiving anything in exchange, and became insolvent as a
2 result of the transfer, were sufficient to show insolvency and a transfer made for lack of
3 reasonably equivalent value, plead a claim under California Civil Code, § 3439.05, and
4 survive a Civil Rule 12(b)(6) motion to dismiss. *Id.*, 2015 WL 12426149, slip op. at *8. The
5 first amended complaint, ECF 9, adequately pleads the element of insolvency under this
6 standard in paragraphs 55 and 72 by alleging that the Bordbar Transfers and Leya
7 Transfers left the Debtor insolvent and left Debtor unable to pay the claims of its creditors
8 in full, which would show either balance sheet insolvency within the meaning of California
9 Civil Code, § 3439.02(a) and/or cash flow insolvency under California Civil Code, §
10 3439.02(b).

11 In a third case, *In re AWTR Liquidation, Inc.*, 548 B.R. 300 (Bankr. C.D. Cal. 2016),
12 this court held that a complaint sufficiently pleaded insolvency for purposes of cash flow
13 insolvency under California Civil Code, § 3439.02 observing that “having ‘liquidity
14 problems,’ being ‘in need of cash’ and similar allegations do not necessarily amount to
15 cash flow insolvency, but stating those allegations are enough to support the express
16 allegations of cash flow insolvency.” *Id.* at 334; *see also*, 11 U.S.C. § 548(a)(1)(B)(ii)(III).
17 Similarly, the court held that a complaint sufficiently pleaded insolvency for purposes of
18 balance sheet insolvency under California Civil Code, § 3439.02, observing that
19 “[u]ncertain’ asset values and debts that eventually ‘crushed’ [d]ebtor do not *necessarily*
20 mean that [d]ebtor is balance sheet insolvent. . . . But these allegations are sufficient to
21 *support* the express allegations of balance sheet insolvency” *Id.* (emphasis in
22 original); *see also*, 11 U.S.C. § 548(a)(1)(B)(ii)(I). Here, Plaintiff’s allegations that Debtor’s
23 books and records indicate insolvency, which the court infers as an allegation of balance
24 sheet insolvency, like the allegations in *AWTR Liquidating*, sufficiently state a plausible
25 claim for relief.

26 Thus, for the foregoing reasons, the court rejects Defendants’ argument that Plaintiff
27 fails to allege anything more than the ultimate conclusion that Debtor was insolvent and
28 that the allegation of insolvency is inadequate since it was based only on “information and

1 belief.” See Motion, ECF 10 at 4. Plaintiff alleging that Debtor was insolvent as shown by
2 its books and records is not a conclusory allegation to be disregarded because the
3 allegation rests on specific facts that, if true, support the element of insolvency for a claim
4 of constructive fraudulent transfer, and such allegation was not made “on information and
5 belief.” *Id.*

6 The first amended complaint adequately pleads the element of transfers lacking
7 reasonably equivalent value in paragraphs 23, 43, 52, 53, 54, 96 and 101 by alleging the
8 Bordbar Transfers, the Legal Fees Transfers, the Plea and Settlement Transfers, the BMW
9 Transfer and the Leya Transfers² were made by Debtor for less than reasonable equivalent
10 value. *Id.* The courts have generally determined that constructive fraudulent transfer
11 claims are adequately pleaded under Federal Rule of Civil Procedure 8(a)(2) when certain
12 elements, such as the “dates, amounts, source, and transferee of each alleged transfer[,]”
13 are alleged. *In re Pennysaver USA Publishing, LLC*, 587 B.R. at 456. Here, Plaintiff does
14 allege the value of each transfer and the parties to the transfer, along with other facts
15 supporting each element of the claims.

16 The Ninth Circuit Bankruptcy Appellate Panel’s decision in *Perez v. Bui (In re*
17 *Tenerio)*, BAP No. CC-17-1102, 2018 WL 989691 (9th Cir. BAP 2018) supports Plaintiff’s
18 argument that the element of transfers lacking reasonably equivalent value was adequately
19 pleaded. In *In re Tenerio*, the court found that the plaintiff’s allegation that the debtor
20 received nothing in return for a transfer was sufficient to adequately plead a transfer for
21 less than reasonably equivalent value. *Id.*, slip op. at *8. (“[T]he Debtor received no
22 consideration in the transfer and therefore did not receive ‘reasonably equivalent value’ . . .
23 .”). Here, Plaintiff’s allegations are, similarly, sufficient to survive a motion to dismiss. See
24 e.g., First Amended Complaint, ECF 9 at ¶¶ 44, 52, 54, 70.

25 Because the elements of insolvency and transfers lacking reasonably equivalent
26 value are adequately pleaded to support Claims 5 and 6 as plausible claims for relief, the

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28 ² Undefined capitalized terms used herein have the meaning ascribed to them in the First Amended
Complaint, ECF 9.

1 court determines that these claims do not fail to state a claim upon which relief can be
2 granted.

3 The court will deny the motion to dismiss as to Plaintiff’s Claims 3 and 4 for
4 constructive fraudulent transfer based on inability to pay debts under California Civil Code,
5 § 3439.04(a)(2) and Plaintiff’s Claims 9 and 10 for avoidance of constructive fraudulent
6 transfers under 11 U.S.C § 548(a)(1)(B) because the claims adequately pleaded the
7 required elements of the inability to pay debts and transfers lacking reasonably equivalent
8 value.

9 California Civil Code, § 3439.04(a) provides: “A transfer made or obligation incurred
10 by a debtor is voidable as to a creditor, whether the creditor's claim arose before or after
11 the transfer was made or the obligation was incurred, if the debtor made the transfer or
12 incurred the obligation as follows: 2) Without receiving a reasonably equivalent value
13 in exchange for the transfer or obligation, and the debtor either: (A) Was engaged or was
14 about to engage in a business or a transaction for which the remaining assets of the debtor
15 were unreasonably small in relation to the business or transaction. (B) Intended to incur,
16 or believed or reasonably should have believed that the debtor would incur, debts beyond
17 the debtor's ability to pay as they became due.”

18 11 U.S.C. § 548(a)(1) provides:
19 (a)(1)“The trustee may avoid any transfer (including any transfer to or for the benefit of an
20 insider under an employment contract) of an interest of the debtor in property, or
21 any obligation (including any obligation to or for the benefit of an insider under an
22 employment contract) incurred by the debtor, that was made or incurred on or within
23 2 years before the date of the filing of the petition, if the debtor voluntarily or
24 involuntarily—. . . .
25 (B) (i) received less than a reasonably equivalent value in exchange for such
26 transfer or obligation; and
27 (ii) (I) was insolvent on the date that such transfer was made or such obligation
28 was incurred, or became insolvent as a result of such transfer or

1 obligation; [or]. . .

2 (III) intended to incur, or believed that the debtor would incur, debts that
3 would be beyond the debtor's ability to pay as such debts matured;
4 . . .”

5 Defendants argue that for these claims, Plaintiff must prove at the time of the
6 Disputed Transfers, Debtor knew or should have known that it could not pay its debts, but
7 Plaintiff in its first amended complaint refers to a series of alleged transgressions by Debtor
8 and Bahram (also known as “Barry”) Bordbar, “which attempts to conjure a great deal of
9 smoke regarding potential liabilities of Prototype, [and] to make it appear as if it is self-
10 evident that when Prototype was making the Disputed Transfers, it was incurring debts
11 beyond its ability to pay.” Motion, ECF 10 at 4-5. Defendants argue that the most
12 important and egregious example is Plaintiff's use of the Crash Victims' claims, which are
13 “contingent, unliquidated and highly speculative.” *Id.* According to Defendants,
14 “[n]otwithstanding that the Trustee seeks to give the impression that Prototype knew that it
15 faced near certain liability in the Blackhawk Crash Action, the Blackhawk Crash Action
16 plaintiffs have nothing more than a contingent, speculative, and unliquidated claim riding
17 on an allegation that has never been proven.” *Id.* at 7.

18 In response, Plaintiff argues that at the time each relevant transfer was made,
19 Debtor knew that its business was operating illegally, knew that it had falsely certified
20 critical aircraft parts or knew that it had been sued by the Crash Victim Claimants, and as
21 such, Plaintiff in his first amended complaint adequately pleaded that Debtor believed that
22 it would incur substantial debts that it simply could not pay. Trustee's Memorandum Of
23 Points and Authorities in Opposition to Certain Defendants' Motion to Dismiss Complaint,
24 ECF 30 at 11-12. In reply, citing *In re Pajaro Dunes Rental Agency, Inc.*, 174 B.R. 557,
25 593 (Bankr. N.D. Cal. 1994), Defendants argue that Plaintiff fails to adequately plead that
26 Debtor incurred debts beyond its ability to pay by failing to plead facts that showed that
27 debtor would not reasonably have been seen as able to pay its debts after making the
28 disputed transfers. Defendant's Reply in Support of Motion to Dismiss Complaint and

1 Supplemental Motion to Dismiss, ECF 53 at 8-9. Defendants further argue that the alleged
2 legal violations go more to the question of legal liability of Debtor and its insiders to the
3 government rather than the financial conditions of Debtor. *Id.* at 9.

4 The court determines that Plaintiff has sufficiently pleaded Debtor's inability to pay
5 for purposes of Claims 3, 4, 9 and 10 for constructive fraudulent transfer because the court
6 can infer such inability to pay its debts as incurred from the circumstances alleged by
7 Plaintiff, particularly with respect to the Crash Victims' personal injury tort and wrongful
8 death claims estimated at approximately \$35 million, though they may be contingent,
9 unliquidated and disputed. Although Defendants make a good point that the Crash
10 Victims' claims have not been determined by a court of competent jurisdiction and are still
11 disputed and unliquidated as this court has acknowledged,³ the case law supports
12 consideration of contingent, unliquidated and disputed claims in determining a debtor's
13 total indebtedness for purposes of determining insolvency or ability to pay debts as
14 incurred. *In re Tenorio*, 2018 WL 989691, slip op. at *9-10, *citing and quoting, Sierra Steel,*
15 *Inc. v. Totten Tubes, Inc. (In re Sierra Steel, Inc.)*, 96 B.R. 275, 279 (9th Cir. BAP 1989); *In*
16 *re Imagine Fulfillment Services, LLC*, 489 B.R. 136, 146 (Bankr. C.D. Cal. 2013).
17 Moreover, as Plaintiff contends, Debtor's inability to pay debts beyond the Crash Victim
18 Claimants' potential \$35 million personal injury tort and wrongful death claims may be
19 adequately pleaded in that the Debtor did not and could not pay any of its debts, including
20 tax debts, wage debts and rent debts as set forth in the first amended complaint at ¶ 50.

21 While Defendants make another good point that the allegations of legal
22

23 ³ The litigation brought by the Crash Victim Plaintiffs to determine Defendants' liability on their personal
24 injury tort and wrongful death claims is still pending in the district court, apparently subject to the
25 automatic stay in this bankruptcy case. Although the Crash Victim Plaintiffs have filed formal proofs
26 of claim for their personal injury tort and wrongful death claims, this court generally lacks jurisdiction
27 to try and determine such claims because such claims are to be tried in the district court pursuant to
28 28 U.S.C. § 157(b)(5), though there is some authority suggesting that this requirement is not
jurisdictional and may be waived. March, Ahart and Shapiro, *Rutter Group California Practice Guide:*
Bankruptcy, ¶¶ 1:526-1:527.2 (online edition, December 2019 update); *accord, Shim v. Lee (In re*
Lee), No. 2:13-bk-10413 RK; Adv. No. 2:13-ap-01420 RK, 2015 WL 1299747, slip op. at *4 (Bankr.
C.D. Cal., March 19, 2015). In any event, Defendants are correct in observing that the Crash
Victims' claims are yet to be proven.

1 transgressions by Debtor and Bahram (or Barry) Bordbar seem more germane to a
2 determination of legal liability to governmental authorities rather than determining financial
3 conditions of the Debtor under the reasonable ability to pay debts test described in *In re*
4 *Pajaro Dunes Rental Agency, Inc.*, 174 B.R. at 593-594, arguably gratuitously throwing dirt
5 on the Defendants, a pattern or practice of engaging in illegal conduct may indicate
6 incurring of debt for which the Debtor lacked the ability to pay because of the exposure to
7 civil and criminal liability of Debtor, which could result in an increased debt load, adversely
8 impacting Debtor's reasonable ability to pay its debts. It may be a logical stretch, perhaps,
9 but the claims are plausibly pleaded. "As long as a plausible claim is pled, the complaint
10 may proceed 'even if it strikes a savvy judge that actual proof of those facts is improbable,'
11 and 'that a recovery is very remote and unlikely.'" Phillips and Stevenson, *Rutter Group*
12 *Practice Guide: Federal Civil Procedure Before Trial, California & Ninth Circuit Edition*, ¶
13 8:124.1, *citing and quoting, Bell Atlantic Corp. v. Twombly*, 550 U.S. at 556. However, as
14 one court has stated, at the pleading stage, the plaintiff is not required to have "specific
15 financial information" to allege that the debtor's financial condition was compromised. *In re*
16 *Covenant Partners, L.P.*, 532 B.R. 84, 93 (Bankr. E.D. Pa. 2015) ("While no specific
17 financial information is alleged on this point, the Court can reasonably infer that the
18 Debtor's financial health was either tenuous at the time of, or irreparably harmed by, the
19 transfers. . . .").

20 The first amended complaint adequately pleads the element of transfers lacking
21 reasonably equivalent value in paragraphs 23, 52, 54, 86 and 91 for Claims 3 and 4.
22 Because the elements of inability to pay debts through insolvency and transfers lacking
23 reasonably equivalent value are adequately pleaded to support Claims 3 and 4 as
24 plausible claims for relief, the court determines that these claims do not fail to state a claim
25 upon which relief can be granted. The first amended complaint adequately pleads the
26 element of transfers lacking reasonably equivalent value in paragraphs 23, 52, 54, 114 and
27 120 for Claims 9 and 10. Because the elements of inability to pay debts through
28 insolvency and transfers lacking reasonably equivalent value are adequately pleaded to

1 support Claims 3, 4, 9 and 10 as plausible claims for relief, the court determines that these
2 claims do not fail to state a claim upon which relief can be granted.

3 As the court has previously observed, the “complaint should be read as a whole, not
4 parsed piece by piece to determine whether each allegation, in isolation, is plausible.”
5 Phillips and Stevenson, *Rutter Group Practice Guide: Federal Civil Procedure Before Trial,*
6 *California & Ninth Circuit Edition*, ¶ 8:125, ¶ 8:127b, *citing and quoting, Hernandez-Cuevas*
7 *v. Taylor*, 723 F.3d at 103. “The relevant question . . . in assessing plausibility is not
8 whether the complaint makes any particular factual allegations but, rather, whether ‘the
9 complaint warrant[s] dismissal because it failed *in toto* to render plaintiffs’ entitlement to
10 relief plausible.” *Id.*, ¶ 127c, *quoting, Rodriguez-Reyes v. Molina-Rodriguez*, 711 F.3d at
11 55, *quoting, Bell Atlantic Corp. v. Twombly*, 550 U.S. at 569 n. 14. Mindful of these
12 observations, the court has considered the allegations of Plaintiff’s first amended complaint
13 to evaluate Defendants’ motion to dismiss.

14 The court observes that most of the claims in the first amended complaint will
15 survive Defendants’ motion to dismiss. Defendants’ motion to dismiss did not challenge
16 certain of Plaintiff’s other claims under the California Uniform Voidable Transactions Act⁴
17 (“CUVTA”) (formerly the California Uniform Fraudulent Transfer Act or CUFTA) and the
18 analogous federal law provisions in 11 U.S.C. § 548 at the pleading stage, and the
19 arguably more strongly pleaded constructive fraudulent transfer claims based on balance
20 sheet insolvency under the CUVTA will survive, as discussed above. Although the
21 constructive fraudulent transfer claims under the CUVTA based on Debtor’s inability to pay
22 debts are challenged by the motion to dismiss and arguably more tenuous, the court
23 believes that such claims should survive as adequately pleaded, as discussed above. As a
24 matter of practicality, such claims are simply an alternative theory of relief, under the
25 CUVTA and analogous federal law, to claims that will proceed. Looking at the first
26 amended complaint as a whole, it adequately pleads claims for fraudulent transfer under
27

28 ⁴ California Civil Code, §§ 3439 – 3439.14.

1 the CUVTA and analogous federal law. In *Potter v. Alliance United Insurance Co.*, 37
2 Cal.App.5th 894, 295 (2019), the California Court of Appeal reversed the trial court's
3 judgment of demurrer to the complaint for actual and constructive fraudulent transfer on
4 grounds that the plaintiff failed to allege insolvency under the CUVTA, holding that the
5 operative complaint had pleaded all three methods of proving a violation of the CUVTA,
6 only one of which requires insolvency, i.e., California Civil Code, § 3439.05. Thus, even if
7 the defendant was correct in alleging that insolvency had not been pleaded, that would
8 have affected one method of proving liability for voidable or fraudulent transfer, and not all
9 of them. In this matter, Plaintiff's fraudulent transfer claims will have to be litigated past the
10 pleading stage, including both actual and constructive fraudulent transfer claims, as well as
11 other claims pleaded in the first amended complaint.

12 For the foregoing reasons, the court orders as follows:

- 13 1. Defendants' motion to dismiss as to Plaintiff's Claim 20 for substantive
14 consolidation is granted, and the claim is dismissed without prejudice and with
15 leave to amend. The court does not set any time limit on amendment.
- 16 2. Defendants' motion to dismiss as to Plaintiff's Claim 21 for trade secret
17 misappropriation is granted, and the claim is dismissed without prejudice and
18 with leave to amend within 30 days of the date of entry of this order. If Plaintiff
19 should amend Claim 21, he should file and serve the amended claim as a
20 supplement to the first amended complaint to allege a trade secret
21 misappropriation claim. If the claim is not timely amended, dismissal will be with
22 prejudice.
- 23 3. Defendants' motion to dismiss as to Plaintiff's Claims 5 and 6 for constructive
24 fraudulent transfer based on insolvency under California Civil Code, §
25 3439.05(a) is denied.
- 26 4. Defendants' motion to dismiss as to Plaintiff's Claims 3 and 4 for constructive
27 fraudulent transfer based on inability to pay debts under California Civil Code, §
28 3439.04(a)(2) is denied.

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- 5. Defendants’ motion to dismiss as to Plaintiff’s Claims 9 and 10 for avoidance of constructive fraudulent transfers under 11 U.S.C § 548(a)(1)(B) is denied.
- 6. Defendants must serve and file their answer to the claims of Plaintiff’s first amended complaint within 30 days of the date of entry of this order, except as to the claims for which the motion has been granted herein (i.e., Defendants must answer the surviving claims).
- 7. The court sets a status conference in this adversary proceeding on February 18, 2020 at 1:30 p.m. in Courtroom 1675, Roybal Federal Building, 255 East Temple Street, Los Angeles, California 90012. Pursuant to Local Bankruptcy Rule 7016-1, the parties must file and serve a joint status report on or before February 11, 2020.
- 8. The hearing on Defendants’ motion to dismiss that was scheduled for December 10, 2019 at 1:30 p.m. was vacated as stated in the court’s tentative ruling issued before the scheduled hearing on December 10, 2019. No appearances were required on December 10, 2019.

IT IS SO ORDERED.

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Robert Kwan
United States Bankruptcy Judge

Date: December 12, 2019